SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 204

HERBERT S. BAUCH, as President of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and ELIZABETH BOND, CLARA LEVINE, SHIRLEY FEINBERG and ELIZABETH McGEE on behalf of themselves and all other employees of the City of New York who have executed authorizations for payroll deductions in favor of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, similarly situated,

Petitioners,

against

THE CITY OF NEW YORK, JOHN V. LINDSAY, Mayor of the City of New York, MARIO PROCACCINO, Comptroller of the City of New York, HENRY SHEMIN, Commissioner of Labor of the City of New York, and HERBERT HABER, Director of Labor Relations of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Herbert S. Bauch, as President of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Elizabeth Bond, Clara Levine, Shirley Feinberg and Elizabeth McGee, on behalf of themselves and all other employees of the City of New York who have executed authorizations for payroll deductions in favor of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, similarly situated, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled case on April 11, 1968.

Opinions Below

The opinion of the Court of Appeals of the State of New York, dated April 11, 1968 is reported at 22 N.Y. 2d 599, — N.Y.S. 2d —, and also at 67 LRRM 2994 and 57 CCH LC ¶ 51,877. It is set forth in full at Appendix A herein, 1a-6a. The opinion of the Supreme Court of the State of New York, County of New York, at Special Term, dated July 25, 1967, is reported at 54 Misc. 2d 343, 282 N.Y.S. 2d 816 and also at 66 LRRM 2226 and 56 CCH LC p. 65,836. It is set forth in full at pages 117-129 of the printed record before the Court of Appeals, submitted herewith pursuant to Rule 21.1 and at Appendix B herein, 7a-19a.

Jurisdiction

The judgment sought to be reviewed was dated and entered in the Court of Appeals of the State of New York on April 11, 1968, and was filed in the office of the Clerk of New York County on April 18, 1968, upon Petitioners' appeal from the order of the Appellate Division of the Supreme Court of the State of New York, First Department, dated and filed in the office of the Clerk of said Appellate Division on November 21, 1967, which said order of the Appellate Division affirmed the order and judgment of the Supreme Court of the State of New York, County of New York, at Special Term, dated August 11, 1967, and filed in the office of the Clerk of New York County on August 15, 1967, which said order and judgment of the Supreme Court dismissed the petition herein. The judgment of the Court of Appeals is set forth at Appendix C herein, 20a-22a. The order of the Appellate Division is set forth at page 133 of the printed record before the Court of Appeals and is reported at 28 A.D. 2d 1209, 285 N.Y.S. 2d 263. The order and judgment of the Supreme Court at Special Term is set set forth at pages 5-6 of the printed record before the Court of Appeals.

The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is invoked under 28 U.S.C. Section 1257(3).

Question Presented

Does the grant by a municipal government of exclusive dues check-off privileges to a union representing a majority of its employees in a collective bargaining unit, and to the members of such majority union, and the withdrawal of all check-off privileges from a minority union, and its members, violate the First and Fourteenth Amendments of the Constitution of the United States?

Constitutional Provisions Involved

The Constitutional provisions involved are the First Amendment of the Constitution of the United States and Section 1 of the Fourteenth Amendment of the Constitution of the United States. The First Amendment of the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case *

I

Presentation of the Constitutional Issue Below

Petitioners' claim under the Constitution of the United States was raised in the initial pleading before the Supreme Court of the State of New York, namely, the petition, verified December 14, 1966, and filed in the office of the Clerk of New York County on December 15, 1966 (12-13). The answer, verified April 18, 1967, denied the allegations of a Constitutional claim (36). The opinion of the Supreme Court at Special Term dealt with and denied the Constitutional claim (124-128, 14a-19a). The Constitutional claim was presented before the Appellate Division. The Appellate Division did not render an opinion (133). The appeal to the Court of Appeals was taken on Constitutional grounds (1a). The opinion of the Court of Appeals dealt with and denied the Constitutional claim (5a-6a).

II

The Question at Issue

The issue in this case was well stated by Chief Judge Fuld of the New York Court of Appeals as follows:

> "This appeal taken upon constitutional grounds, poses the question—of first impression in this court— whether the City of New York may grant a dues 'check-off' privilege to a union representing a majority of the municipal employees in a city-wide bargaining unit and yet deny such privilege to a minority union." (1a)

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* Numerical citations refer to pages of the printed record before the Court of Appeals submitted herewith, unless otherwise indicated. Numerical citations followed by the letter "a" refer to pages of the annexed appendices.

The New York Court of Appeals answered the question affirmatively. It is the Petitioners' contention that this was in error and that the act of the City of New York violated their rights under the First and Fourteenth Amendments of the Constitution of the United States.

III

Union Petitioner

Petitioner, Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the "Union" or "Local 832"), is a civil service union whose membership consists of approximately 1,700 City employees (25). Most of Local 832's members are employed in non-supervisory clerical positions (26). These employees are traditionally among the lowest paid of all workers in the City. They include a disproportionately large number of persons from society's poorest economic groups (*Ibid.*).

IV

Individual Petitioners

Petitioners Elizabeth Bond, Clara Levine, Shirley Feinberg and Elizabeth McGee are employees of the City of New York who are members of the petitioner Union and who have executed authorizations for payroll deductions in favor of the petitioner Union. They sue "on behalf of themselves and all other employees of the City of New York who have executed authorizations for payroll deductions in favor of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, similarly situated" (9, 10).

V

Check-Off

Since 1956 the City of New York (hereinafter the "City") has maintained in effect an arrangement whereby its employees are permitted to assign out of their wages an amount equal to their union dues which is then paid over to the designated union at regular intervals (11, 38). Such an arrangement is commonly referred to in labor relations terminology as the check-off.

The check-off is contingent upon receipt by the City of a written authorization by each employee whose wages are to be affected (16). When so authorized, the City customarily makes the appropriate deduction at the close of each payroll period and pays it over to the designated union through a committee established for that purpose (19-21).

The check-off was instituted by the City pursuant to a resolution adopted by the Board of Estimate on January 12, 1956 (11, 38). The Board of Estimate's action was based upon an opinion of the Corporation Counsel who ruled that the check-off could validly be undertaken by the City, upon condition however that if granted to one union it must be granted to all unions. The following is the relevant portion of the resolution, including the reference to the opinion of the Corporation Counsel:

> "Whereas, the Corporation Counsel has rendered an opinion to the effect that the City can legally accept and honor such [check-off] authorization under the following circumstances:
>
> • • •
>
> "(2) It should be founded upon an agreement by the union and each individual employee consenting to such deduction.
>
> • • •
>
> "(5) These authorizations should be available to all unions, without discrimination • • •" (15).

From 1956 until 1966 the City, pursuant to the Corporation Counsel's ruling, maintained the check-off for all employees who wished to avail themselves of this convenience. The arrangement was non-discriminatory. It was a matter of indifference to the City which union the employee selected and whether that union was a majority or a minority union (29-30).

In effect this arrangement made available to all employees the City's Treasury and payroll facilities upon an impartial basis.

VI

Need of Low-Income Workers for Check-off

The check-off is of tremendous value to low income City workers and their unions. City jobs are scattered widely throughout the City's more than 300 square miles. The same is true of workers' homes, some of which are in Long Island or other suburbs. The Union's 1,700 members are employed in dozens of the City's departments and agencies (25). They are scattered throughout 400 locations in the five boroughs (28).

It is not a simple matter for a City worker to travel to the union office after each two-week pay-day to make payment of his dues. Such a round trip may involve two hours or more of travel. A low-income worker can afford neither the time nor the subway fare. The hours of his work may be such that he cannot get to the union office at all unless he leaves his job.

Low-income workers of the categories here involved do not customarily have regular checking accounts (26). They cannot therefore mail a check to the union in payment of their dues after each pay-day, and they would certainly be ill-advised to attempt to send cash by mail. The purchase of postal money orders involves not only additional expense but travel to a post office and waiting time for the issuance

of the money order. The worker would again face the dilemma of taking time off from his job or failing to pay his dues on time.

The dispersion of these workers throughout the City as well as the obvious unreliability and disruptive effect of trying to bring in the dues by union collectors calling at job sites make that method unworkable (96-97). It is impossible for a labor organization to maintain a professional staff capable of collecting dues in 400 locations throughout a wide geographical area. Even if that could be done, the cost of collecting dues would exceed the amounts collected (31). If low-income workers do not pay their dues promptly they spend their money and find it impossible to catch up at a later date (31). Prompt payment by check-off has been found to be the only practical method for assuring essential revenues to labor unions and for protection of the good standing and the benefits of union members (28, 30).

While these considerations are particularly applicable to low-income municipal employees, similar considerations obtain throughout private industry. Because of these considerations check-off is the prevailing method for the collection of union dues (27-28, 96, 97). For industry generally the check-off was validated by Section 302(c)(4) of the Lobor-Management Relations Act of 1947, 29 U.S.C. § 186 (c)(4), which excepts from proscribed payments to unions:

> ". . . money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment . . ."

For the railway and airline industries such deductions are authorized by Section 2 Eleventh (b) of the Railway Labor Act, 45 U.S.C. § 2 Eleventh (b), which was added to the Act in 1951.

VII

Need of Union for Check-off

It is the uncontradicted allegation herein of Herbert S. Bauch, the President of Local 832, that it would be impossible for Local 832 to survive without the check-off, that it could not otherwise obtain its essential revenue, and that elimination of check-off would put Local 832 out of business (28, 30, 97).

VIII

The City's Deal with District Council 37 for Exclusive Check-off

During the latter part of 1966 the City engaged in negotiations with District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "D.C. 37") which it recognized as the majority union in a City-wide unit of non-supervisory clerical employees (30, 39-40). On December 2, 1966 the City agreed that D.C. 37 would thereafter have the check-off exclusively, and that check-off would be discontinued for all other unions representing such employees (*Ibid.*) The City thus agreed with a rival union that Local 832 should be deprived of its check-off privilege.

Apparently this deal was made because the City believed that if it strengthened the hand of D.C. 37, it could obtain better terms and conditions from that organization and forestall a strike. In this connection it submitted to the New York Supreme Court, at Special Term, a chart showing that D.C. 37 strikes have been responsible for more than 165,000 of the 220,140 man days lost in City employee work stoppages since 1958 (80-81). It decided therefore to give this special support to D.C. 37 and at the same time to weaken and destroy rival labor organizations which might compete for the loyalty of the employees.

The foregoing may be derived from the City's own papers. The affidavit of Herbert Haber, the City's Director of Labor Relations, states:

> "Such controversies, unless forestalled by sound and enlightened planning, can seriously interrupt the ability of the City government to provide essential services . . ." (67)
>
> "The exclusive check-off procedure is based on a recognition of the foregoing considerations. It grants the majority organization a form of support and prestige which enables it to withstand with less harm to its representative functioning, the effects of wasteful rivalries and disruptive minority campaigns" (71-72).
>
> "Experience in the private and public sectors has demonstrated that where the exclusive majority representative is given a defined role in the employee relations program, designed to secure the uninterrupted and efficient functioning of the employer's enterprises, it is necessary to provide arrangements which aid and strengthen its ability to carry out that role" (72).

IX

The Mayor's Executive Order

At the time the deal between the City and D.C. 37 was made there was no enabling legislation which would permit the City to withdraw check-off privileges from other unions. As part of his deal with D.C. 37 Haber promised to have the Mayor issue an Executive Order which would purport to legalize the grant to that union of exclusive check-off privileges (64). The proposed Executive Order would grant the check-off privilege exclusively to a union representing the majority of employees in an appropriate collective bargaining unit and would withdraw the check-off privilege from all minority unions. That Executive

Order has never been issued. The City alleges that it would have been issued but for the commencement of this proceeding on December 15, 1966, and the stipulation for a stay pending its hearing and determination (64-65) by the New York State courts.

X

Destructive Effect of City's Act

Herbert Bauch, President of the petitioner Union, described as follows some of the benefits other than mere membership, which the Union provides by means of the dues check-off:

> "6. Local 832 provides numerous benefits for its members without discrimination, whether or not they are included in certified bargaining units. These benefits include payments to a member's beneficiary upon his death, free dental care, ambulance service, blood transfusions, eye examinations and eyeglasses, rental of hospital beds, crutches and wheelchairs, and a very modest pension program.
>
> "7. These benefits are not luxuries. For the low-income people who are our members they are absolute necessities and constitute the only means by which these persons and their families are saved from public charity in time of need.
>
> "8. Members do not pay any premiums for these benefits. Eligibility is dependent solely upon prompt payment of dues which Local 832 must have to finance the benefits.
>
> "9. For several years prior to 1956 Local 832 and other labor organizations representing City employees were faced with severe financial hardships. On the one hand we were confronted with escalation of hospital and medical costs, rising insurance premiums and the need for improved administrative procedures to maintain contact with members as they became absorbed in the City's expanding bur-

> eaucracy. On the other hand the collection of dues was frequently impossible because most of our members were in a precarious economic condition." (27)

The destructive effect of the City's discriminatory action is described by Bauch as follows:

> "20. The agreement with AFSCME [D.C. 37] will cut off Local 832's revenues. It is impossible for any labor organization to achieve personal collection of dues from 1700 persons employed in 400 different locations throughout a large geographical area. The cost of collecting dues would exceed the amounts collected. Even if such an immense undertaking could be conceived, it would not be successful. The check-off system provides for deductions from each weekly or bi-weekly payroll. Such immediate deductions are essential because persons in the economic class of Local 832's members will not set aside monies from their payrolls. The agreement with AFSCME [D.C. 37] gives AFSCME [D.C. 37] nothing which it does not already have. It is a flagrantly discriminatory act which can have no purpose other than the destruction of Local 832 and the rights of its members." (31)

The above quoted statements are the uncontradicted facts of this record.

XI

The City's Contention

The City has attempted to rationalize and justify its action as a necessary strengthening of majority unions in the interest of greater stability in labor relations and less disruption of City services. It has compared its action to the granting of other forms of union security, such as the union shop provision and the provision for exclusive recognition of majority unions for collective bargaining purposes, and has asserted that in view of this Court's approval of the constitutionality of statutes authorizing such provisions the present case may be deemed *a fortiori*.

XII

The Decision of the New York Court of Appeals

The New York Court of Appeals found that under New York State law the Mayor of the City of New York was authorized to act as he did and that "no further legislative sanction is required". (3a) It also decided against Petitioners as to other contentions made under state law. Turning to constitutionality the court said:

> "Since we find no statutory obstacle in the way of the City's proposed check-off policy, we turn to a consideration of whether that policy would, as Local 832 urges, deprive it of due process or equal protection of the laws. We agree with the courts below that it would not. The requirements of due process are satisfied as long as the challenged measure is reasonably related to the attainment of a permissible objective. * * * Similarly, the standards of equal protection are met if a classification, or a distinction among classes, has some reasonable basis. * * *
>
> "In the case before us, the existence of such a reasonable relationship and basis is apparent. The maintenance of stability in the relations between the City and employee organizations as well as the avoidance of devastating work stoppages, are major responsibilities of the city administration. The Mayor seeks to further these objectives by introducing into city labor relations a practice which has become commonplace in private industry and in the labor policies of other governmental bodies. * * * The City program is in accord with national labor policy, which has been built on the premise that a majority organization is the most effective vehicle for improving wages, hours and working conditions. * * *
>
> "The petitioners also argue that the withdrawal of the dues check-off will weaken their minority union to the point of threatening its very existence. They will thus be deprived, they assert—pointing to such decisions as *Bates* v. *Little Rock* (361 U.S. 516), *N.A.A.C.P.* v. *Alabama* (357 U.S. 449) and *Thomas* v. *Collins* (323 U.S. 516) [footnote omitted]

—of their right of freedom of association guaranteed by the First and Fourteenth Amendments of the Federal Constitution and by Article I of the State Constitution. Their claim lacks substance. Nothing in the City's labor policy denies members of the petitioners' union the right to meet, to speak, to publish, to proselytize and to collect dues by the means employed by thousands of organizations of all kinds, that do not have the benefit of a dues check-off. Neither the First Amendment nor any other constitutional provision entitles them to the special aid of the City's collection and disbursing facilities." (5a-6a)

Reasons for Granting the Writ and Summary of Argument

This case involves two important Constitutional issues relating to the right of municipal employees to be free from discrimination based on union membership. These are:

1. Whether the discriminatory denial of union dues check-off privileges to a minority union and its members by a municipality denies such union and members of their Constitutionally protected freedom of association without due process; and

2. Whether the grant of exclusive union dues check-off privileges to a majority union and its members by a municipality violates the Constitutional guarantee of equal protection of the laws.

The Court of Appeals answered these questions in the negative. These questions have not been directly determined by this Court, but as is shown in the argument which follows, the rulings of the Court of Appeals are not in accord with the principles established in the relevant decisions of this Court.

Petitioners' contentions are set forth in the argument under the following headings:

POINT I

THE CITY'S ACT IS WHOLLY DESTRUCTIVE AND IS AN UNJUSTIFIABLE INVASION OF THE PETITIONERS' RIGHTS OF FREEDOM OF ASSOCIATION AND SPEECH.

Under Point I it is shown that the case at bar is unique in that the City of New York has taken away a vital privilege from the minority without granting anything which is essential to the welfare of the majority. It is an uncontradicted fact that withdrawal of check-off will destroy the Petitioner union. The City's act is therefore found to be a wholly destructive and unnecessary deprivation of minority rights, not justifiable on the basis of any compelling state interest.

POINT II

EVEN IF EXCLUSIVE CHECK-OFF WERE PERMISSIBLE IN THE PRIVATE SECTOR IT WOULD NOT BE PERMISSIBLE IN THE PUBLIC SECTOR.

Under Point II it is shown that since the denial of check-off in the case at bar involves a municipal government's positive act, and not merely permissive legislation applicable to employers and the unions with whom they deal on the basis of voluntary collective bargaining in the private sector, there is present the element of coerciveness which establishes the unconstitutional discrimination.

POINT III

THE CITY'S ACT VIOLATED THE PETITIONERS' RIGHTS UNDER THE EQUAL PROTECTION CLAUSE.

Under Point III it is shown that the check-off privilege in the case at bar involves a public facility, namely, the treasury and bookkeeping machinery of the City of New

York and that, as in the case of other public facilities which need not be made available to the public, once such facility is made available its use must be granted to all on a non-discriminatory basis. By unnecessarily limiting its use to majority unions the City made an unreasoned distinction and violated the Petitioners' rights under the Equal Protection Clause. There is no factual support in the record for the City's assertion that its act will stabilize labor relations except in the savage sense of exterminating minorities.

POINT I

The City's act is wholly destructive and is an unjustifiable invasion of the Petitioners' rights of freedom of association and speech.

The case at bar is unique in that the City of New York has taken away a vital privilege from the minority without granting anything which is essential to the welfare of the majority. Therefore it cannot be said that the decisions of this Court in cases such as *Railway Employees* v. *Hanson,* 351 U.S. 225 (1956) and *Virginian Railway* v. *System Federation,* 300 U.S. 515 (1937) are controlling here.

There is no inconsistency here, as there would be in the case of the exclusive bargaining privilege, in granting equal privileges to members of majority and minority unions. Once the majority union is granted a non-exclusive check-off privilege it has all that it needs. It gains nothing else of legitimate concern to it by making the privilege exclusive. Exclusivity in bargaining for the entire group is essential in order that the bargaining process may be viable. Exclusivity in check-off means only that the minority will be exterminated.

Of course it might be argued that there is some sort of gain for a majority when a competitive minority is exterminated, but that is precisely the sort of gain, autocratic

and vengeful rather than essential to the democratic process, which the Constitution must guard against. Whether or not the City of New York is right in its belief that it may gain more labor stability by exterminating minority labor organizations it is not entitled to achieve stability at that high cost.*

To deny to a minority union the facilities necessary for its economic life is also to deny the persons who have selected that union their constitutional right of freedom of association. The uncontradicted facts of this case are that check-off is an absolutely necessary requirement for the Union's survival and that the Union will be exterminated if its members are deprived of the check-off privilege (28, 30-31, 97). Freedom of association would be meaningless if the City could by such indirect means extinguish the group which the individual selected for his association.

In approving the exclusive bargaining privileges of majority unions, and in approving the union shop, this Court recognized that no effective system of industrial democracy could be established unless the minority yielded some privileges to make it possible for a functioning majority to exist. Some exclusive privileges for the majority were found to be indispensable if there were to be any bargaining process at all. Implicit in the Court's reasoning was the conclusion that we know of no means by which a free society may be maintained except by rule of the major-

* There is no factual support in the record for the City's claim that its act will stabilize labor relations. Non-discriminatory check-off privileges mean nothing more than that the City's facilities may be utilized impartially by all City employees. Such use does not determine union allegiance; it follows it. It does not create labor unrest or disruption but the very opposite. Employees sign check-off authorizations because they have selected a union. They do not select a union after or because of their check-off authorization. The fact is that suppression of free choice and denial of equal use of the City's check-off facilities is likely to cause disruption in labor relations, and not the reverse.

ity. It is the point of this petition that the foregoing concessions to democratic procedure are in the nature of necessary evils. But it is of the essence of this point that only such concessions as are indispensable are constitutionally permissible.

In the case of the exclusive collective bargaining privilege it is readily apparent that only one agent can perform the bargaining function for the group. A multiplicity of bargaining agents would, in effect, be industrial anarchy. It was necessary to conclude that the majority should function as the collective bargaining representative for the entire unit or else to conclude that labor organizations should have no bargaining sanction at all:

> "Wherever private contracts conflict with its [National Labor Relations Board's] functions, they obviously must yield or the Act would be reduced to a futility". (*J. I. Case* v. *N.L.R.B.* 321 U.S. 332 (1944))

As to the union shop provision, the facts of industrial life show that the costs of the bargaining process are great and that it cannot be expected to survive unless all employees who profit by it are required to contribute to its upkeep. Accordingly, it was concluded that the elimination of "free riders" was a legitimate necessity, and that the union shop and the agency shop could lawfully be granted to majority unions:

> "We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendment." (*Railway Employees'* v. *Hanson,* 351 U.S. 225, 236-238 (1956))
>
> ". . . all that was held in Hanson was that § 2, Eleventh was constitutional in its bare authorization of union-shop contracts requiring workers to give

> 'financial support' to unions legally authorized to act as their collective bargaining agents." (*International Association of Machinists* v. *Street*, 367 U.S. 740, 749 (1961)).

In each case above considered a positive benefit was granted to the majority. In each case it appeared that such positive benefit was necessary for the survival of the majority. In no case was a privilege withdrawn from the minority without corresponding benefit to the majority.

The New York Court of Appeals' opinion states that "The City program is in accord with national labor policy, which has been built on the premise that a majority organization is the most effective vehicle for improving wages, hours and working conditions." (5a-6a). So far as it goes that may be a correct statement of national labor policy, but there should be added to it the observation that this Court has never sanctioned support of the majority which involved suppression of the minority on a matter not essential to the life of the majority. When this Court has had to consider the constitutional validity of majority union privileges it has carefully limited them to the actual necessities of industrial democracy. It has at the same time carefully pruned away excessive majority privileges which interfered with the constitutional rights of the minority.

In validating the union shop provision in Section 8(a)(3) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 158(a)(3), this Court has held that the obligation of the employee to become a "member of the majority union" can mean no more than that he must pay or tender the standard initiation fees and dues:

> "'Membership' as a condition of employment is whittled down to its financial core. This Court has said as much before in Radio Officers' Union v. Labor Board, 347 U. S. 17, 41, 74 S. Ct. 323, 336 . . ." (*N.L.R.B.* v. *General Motors Corporation*, 373 U.S. 734, 742 (1963))

Dues payments are deemed essential for the economic life of the majority union, but the necessity for sharing the cost of the bargaining process has been held not to include any obligation on the part of a dissenting employee to offer his loyalty to the majority. He is constitutionally entitled to reserve his loyalty for the organization of his choice or for no organization at all. Accordingly, he is not required to support the political activities of the union:

> "... we hold ... that § 2, Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." (*International Association of Machinists* v. *Street*, 367 U.S. 740, 768-769 (1961)).

With respect to the exclusive bargaining privilege this Court was careful to point out, both with respect to the National Labor Relations Act (§ 9(a), 29 U.S.C. § 159(a), and with respect to the Railway Labor Act (§ 2 Ninth, 45 U.S.C. § 2 Ninth), that the statutes are worded so as to protect the individuals' rights to present grievances to their employer, and also to permit them to make individual contracts which do not interfere with "the negotiation of labor contracts generally applicable to employees". See *NLRB* v. *Jones and Laughlin*, 301 U.S. 1, 45 (1937) and *Virginian Railway* v. *System Federation*, 300 U.S. 515, 549 (1937). Before leaving these cases it should be noted that in *Virginian Railway* this Court did not pass on the constitutional rights of the employees, but stated that "The railroad can complain only of the infringement of its own constitutional immunity, not that of its employees". (300 U.S. 515, 558).

This Court has in no instance approved a wholly destructive and unnecessary deprivation of minority rights. That is the unique issue in the case at bar.

POINT II

Even if exclusive check-off were permissible in the private sector it would not be permissible in the public sector.

The discussion of the preceding point has shown that exclusive check-off is a wholly destructive provision which contributes nothing to the legitimate needs of the majority, and is not a justifiable limitation of the First Amendment rights of the minority even in the private sector of industry. When we come to consider the public sector the case is much clearer.

It has been shown that approval by this Court of the union shop provision in the private sector of industry does not involve any coercive governmental act. In *International Association of Machinists* v. *Street*, the dissenting opinion of Mr. Justice Frankfurter, joined in by Mr. Justice Harlan, pointed out:

> "Congress has not commanded that the railroads shall employ only those workers who are members of authorized unions. Congress has only given leave to a bargaining representative, democratically elected by a majority of workers, to enter into a particular contractual provision arrived at under the give-and-take of duly safeguarded bargaining procedures. (The statute forbids distortion of these procedures as, for instance, through racial discrimination. Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 65 S. Ct. 226, 98 L. Ed. 173.) Congress itself emphasized this vital distinction between authorization and compulsion. S. Rept. No. 2262, 81st Cong., 2d Sess. 2. And this Court in Hanson noted that 'The union shop provision of the Railway Labor Act is only permissive. Congress has not * * * required carriers and employees to enter into union shop agreements.' 351 U.S. at page 231, 76 S. Ct. at page 718. When we speak of the Government 'acting' in permitting the union shop, the scope and force of

> what Congress has done must be heeded. There is not a trace of compulsion involved—no exercise of restriction by Congress on the freedom of the carriers and the unions." (367 U.S. 740, 807)

In contrast, in the case at bar, by governmental act relating to the public facilities of a city, the members of minority unions are categorically deprived of the privilege of check-off. The City of New York has exercised state power specifically and coercively to assist members of certain unions in giving financial support to their organizations while denying to the members of other unions, no less taxpayers and citizens, equal access to a public facility.

When it is noted that employees in the public sector, in New York as well as elsewhere, are prohibited from striking or otherwise withdrawing their services from their municipal employer,* the totality of coerciveness is impressive. The minority employee cannot express his dissent in any effective way while the majority, in addition to exclusive bargaining rights, is given exclusive use of a public facility supported by the entire community.

The New York Court of Appeals, comparing the employees here involved to minority employees in the private sector, justified the denial of check-off as follows:

> "Nothing in the City's labor policy denies members of the petitioners' union the right to meet, to speak, to publish, to proselytize and to collect dues by the means employed by thousands of organizations of all kinds, that do not have the benefit of a dues check-off. Neither the First Amendment nor any other constitutional provision entitles them to the *special aid* of the City's collection and disbursing facilities." (6a) (emphasis added).

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* See the New York State Public Employees' Fair Employment Act, Civil Service Law, art. 14; L. 1967, ch. 392, known also as the Taylor Act.

What the Court of Appeals overlooked in making the above statement was that the City's disposition was not even-handed. Standing alone, denial of check-off privileges for all City employees would be constitutionally unassailable. The vice here is in the discrimination. Here we have not merely a denial of a privilege, but a grant to a favored majority coupled with a denial to a minority. Moreover, as we have shown, the denial appears to be uncalled for and unprincipled.

Finally, it can not be overlooked that for more than 10 years, since 1956, the City has granted check-off impartially to both majority and minority unions. The unions now representing City employees have been developed and matured in reliance upon the check-off. The City now proposes to remove a vital prop upon which the structure of its minority as well as its majority unions is based. This can not realistically be equated with a plea for "special aid" as expressed by the Court of Appeals. The Petitioners are not pleading for "special aid". They are pleading for non-discriminatory treatment in order to preserve their freedom of association.

The opinion of the Court of Appeals refers to exclusive check-off as "a practice which has become commonplace in private industry and in the labor policies of other governmental bodies". Among the examples cited is the reference to the Railway Labor Act (5a). This Court, however, has not passed on the constitutionality of an exclusive check-off statute even in relation to the private sector.

A check-off system in the railroad industry, limited to unions "national in scope" has been reviewed by the Eighth and Ninth Circuits but its constitutionality has not been questioned. In *Switchmen's Union* v. *Southern Pacific*, 253 F.2d 81 (9th Cir. 1958), the Court of Appeals for the Ninth Circuit construed the Railway Labor Act, 45 U.S.C.

§ 152, Eleventh (b)* and (c), as intended to prevent compulsory dual unionism in the railroad industry, noting the "high job mobility" in that industry, and therefore as intended to preclude check-off to certain labor organizations in order to avoid any compulsion for double payment of dues. There is no indication that any constitutional question was raised. This Court denied certiorari without opinion (358 U.S. 818 (1958), rehearing denied 358 U.S. 896 (1958)). In *Brotherhood of Locomotive Firemen* v. *Northern Pacific,* 274 F.2d 641 (8th Cir. 1960), another question as to the construction of § 152, Eleventh (b) and (c) of the Railway Labor Act was considered by the Eighth Circuit, and it was concluded that it was intended "to avoid compulsory dual unionism", but again there is no indication that any constitutional question was raised or considered. Both of these cases are based upon *Pennsylvania Railroad* v. *Rychlik,* 352 U.S. 480 (1957), in which this Court was construing Section 2, Eleventh (c) of the Railway Labor Act with respect to its union shop requirement only. This Court has had no occasion to consider the constitutionality of exclusive check-off.

As has already been pointed out, statutes such as the Railway Labor Act involve only permissiveness on the part of the government with respect to the scope of free collective bargaining in the private sector. They do not

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* Section 152, Eleventh provides that

> ". . . any carrier or carriers as defined in this Act and a labor organization or organizations duly designated and authorized to represent employees in accordance with the requirements of this Act *shall be permitted*—
>
> * * *
>
> (b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues . . ." (emphasis added).

involve the element of coerciveness which is present when the use of a state-owned facility is withdrawn from a minority. Whatever conclusion may ultimately be reached as to the private sector it is clear that in the public sector the state action complained of is unconstitutional.

POINT III

The City's act violated the Petitioners' rights under the Equal Protection Clause.

Discrimination by a State in permitting the use of its public facilities is prohibited by the Equal Protection Clause of the Fourteenth Amendment. *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966); *Brown* v. *Louisiana,* 383 U.S. 131 (1966); *East Meadow* v. *Board of Education,* 18 N.Y. 2d 129, 272 N.Y.S. 2d 341 (1966).

As this Court said in *Rinaldi, supra,* the State may not be required to provide certain facilities to the public, but, if provided, access must be granted to all persons equally:

> "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." (384 U.S. 305, 310)

In *Brown* v. *Louisiana, supra,* this Court stated in regard to the use of a public library:

> "A State or its instrumentality may, of course, regulate the use of its libraries or other public facilities. But it must do so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all." (383 U.S. 131, 143)

In *East Meadow, supra,* the New York Court of Appeals, speaking of the use of a high school auditorium for public concerts, said:

> "The State is not under a duty to make school buildings available for public gatherings but, if it elects to do so, it is required, by constitutional provision (U.S. Const., 14th Amdt.; N.Y. Const., art. I, § 11), to grant the use of such facilities 'in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all.' (Brown v. State of Louisiana, 383 U.S. 131, 143, 86 S. Ct. 719, 724, 15 L. Ed. 2d 637; see, also, Evans v. Newton, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373; Matter of Ellis v. Allen, 4 A.D. 2d 343, 344, 165 N.Y.S. 2d 624, 626, app. dismd. 4 N.Y. 2d 693, 171 N.Y.S. 2d 86, mot. for lv. to app, den: 4 N.Y. 2d 674, 171 N.Y.S. 2d 1027, 148 N.E. 2d 915; American Civil Liberties Union v. Board of Educ., 59 Cal. 2d 224, 28 Cal. Rptr. 712, 379 P. 2d 16; Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P. 2d 885.) The defendant has concededly allowed a number of organizations, including the very plaintiff before us, to use the school auditorium for nonacademic purposes for many years. It follows, therefore, that, in deciding who is to be permitted to use its school, the board must not unconstitutionally discriminate against the plaintiff." (18 N.Y. 2d 129, 133-134, 272 N.Y.S 2d 341, 344-345)

The New York Court of Appeals has mistakenly attempted to distinguish this case upon the theory that it did not involve positive state action. Referring to *Bates* v. *Little Rock,* 361 U.S. 516 (1960), *NAACP* v. *Alabama,* 357 U.S. 449 (1958), and *Thomas* v. *Collins,* 323 U.S. 516 (1945), the New York Court of Appeals stated:

> "The petitioners' reliance on these decisions is misplaced. The cited cases involved attempts by states to hinder organizations by some affirmative prohibition upon, or intrusion into, their activities. There is not the slightest suggestion that a state or

> other body must provide services to an organization to help it maintain its competitive position with its rivals." (6a, n5)

The New York Court of Appeals somehow overlooked the fact that precisely what the City of New York did in this case was "to hinder organizations by some affirmative prohibtion". The City did not merely fail to provide a service, namely the check-off facility. It affirmatively joined with a rival union and agreed to enact a city law which would favor the rival union, as well as other majority unions, and which would result in the extermination of the petitioner Union. It made exclusive check-off compulsory. That is not a mere failure to assist. It is a positive and discriminatory deprivation.

The New York Court of Appeals has described the exclusive check-off arrangement as "a method of implementing union security, so widely utilized and so long tested", and has therefore declared it to be a provision which "may not be said to lack a reasonable basis or to be unrelated to the City's legitimate purposes" (6a).

There is, however, no factual basis in the record for such a conclusion. The City has made no attempt to show what legitimate benefit it or the majority union gains by visiting this deprivation upon the minority. The functioning of the majority is in no way improved or facilitated. What it plainly boils down to is the extermination of the minority. This is not an implementation of "union security" except in the most savage sense. It is an "unreasoned distinction" such as this Court struck down in *Rinaldi* v. *Yeager,* and in *Brown* v. *Louisiana.*

The Court of Appeals uncritically accepted the City's claim that its act was founded on a "reasonable basis":

> "The maintenance of stability in the relations between the City and employee organizations as well as the avoidance of devasting work stoppages, are

> major responsibilities of the city administration. The Mayor seeks to further these objectives by introducing into city labor relations a practice which has become commonplace in private industry and in the labor policies of other governmental bodies . . ." (5a)

As we have pointed out earlier (p. 17n, *supra*), there is no factual basis for the assertion that labor relations will be stabilized and strikes avoided by exclusivity of check-off. Employees sign check-off authorizations after they select a union; they do not select a union after they have signed the check-off. Suppression of free choice and denial of equal use of the City's check-off facilities appears more likely to cause disruption in labor relations than the reverse. No study has been shown, no legislative hearing has been pointed to, no experience has been set forth which purports to demonstrate that a discrimination such as is here involved (a) is necessary for the survival of the majority or (b) would contribute to peaceful labor conditions. The City's assertion to the contrary is not self-validating; it is simply the least that might be expected of the City in defense of its action.

Where personal liberty is involved, such as freedom of association, this Court has not accepted assertions of reason and necessity uncritically. It has placed the burden on the State of demonstrating the validity of its assertions:

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. N.A.A.C.P. v. State of Alabama, 357 U.S. 449, 78 S. Ct. 1163 . . ." (*Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960))

This record is devoid of proof showing that a reasonable distinction based upon a compelling State interest was the basis for the City's action.

CONCLUSION

For the foregoing reasons, it is respectfully urged that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York.

Respectfully submitted,

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APPENDIX A

(Opinion of the Court of Appeals of the State of New York, dated April 11, 1968)

FULD, *Ch. J.*:

This appeal, taken upon constitutional grounds, poses the question—of first impression in this court—whether the City of New York may grant a dues "check-off" privilege to a union representing a majority of the municipal employees in a city-wide bargaining unit and yet deny such privilege to a minority union.[1]

In 1956, the City's Board of Estimate adopted a resolution which granted the check-off privilege to all organizations of city employees whose members authorized the necessary payroll deductions. At that time, the City did not recognize any union as an agent for collective bargaining. Later, the City began to recognize unions as exclusive bargaining agents if they were chosen by a majority of the employees in an appropriate bargaining unit. Even then, however, the Board of Estimate resolution extending the check-off privilege to all unions alike was not changed and the City continued to give effect to its provisions.

In April, 1967, the City modified its union recognition policies by means of an executive order of the Mayor. The order provided (1) that appropriate bargaining units for municipal employees were to be established on a city-wide basis or, in some instances, on a departmental basis and (2) that the organization chosen by a majority of the employees in each such unit was to be recognized as the exclusive bargaining representative for all employees in the unit.

The Mayor proposes to round out this policy by means of a further executive order which will give the privilege

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[1] In labor relations parlance, the "check-off" is the practice whereby an employer deducts the amount of a union member's dues from his pay, usually on the employee's express authorization, and remits it directly to the union.

of dues check-off solely to the exclusive bargaining agents and will withdraw it from all other unions. It is the declared opinion of the Mayor and the City's Director of Labor Relations that this plan for a restricted check-off policy, common in private industry, will afford the majority representatives a form of "union security", will increase their prestige and responsibility and will, in consequence, stabilize the collective bargaining process.

Local 832 (International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America) and District Council 37 (American Federation of State, County and Municipal Employees, AFL-CIO) are two unions which include persons employed by the City in nonsupervisory clerical titles. District Council 37 has been recognized by the City as the exclusive bargaining representative for such employees; under the proposed plan it will thus have the exclusive benefit of the dues check-off. Local 832, on the other hand, is a minority union and, accordingly, it will be deprived, under the proposed plan, of the check-off privilege it has enjoyed since 1956.[2] Strongly objecting, the latter organization, Local 832, has commenced this article 78 proceeding—through its president and several of its members on behalf of themselves and all others similarly situated—to require the City to continue the check-off of dues to it, and to enjoin the City from granting exclusive check-off privileges to District Council 37 or any other labor organization.[3] The court at Special Term dismissed the petition

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[2] District Council 37 has majority representation status in city-wide units covering over 57,000 employees and in department-wide units covering some 1,300 more. In sharp contrast, Local 832, having an overall membership in the neighborhood of 1,700, represents only about 1,000 nonsupervisory clerical workers.

[3] The court at Special Term found that the City had undertaken to issue the proposed check-off order in a collective bargaining agreement with District Council 37 and that such agreement constitutes a "final determination" sufficient to provide the basis for review under CPLR article 78. (See *Matter of Lipsett* v. *Gillette*, 12 N Y 2d 162, 166.)

and the Appellate Division unanimously affirmed the resulting order.

Under the 1963 New York City Charter (§ 8), the Mayor is authorized to "exercise all the powers vested in the city, except as otherwise provided by law." He is the successor to the residual powers originally possessed by the Board of Estimate under a similarly worded provision of the 1938 New York City Charter (§ 70) in effect in 1956, when that body adopted the "non-discriminatory" check-off policy. (See, also, New York City Charter [1963], § 1142.) The City—and, thus, the Mayor on its behalf—is empowered to enter into contracts, to regulate the terms of employment and compensation of city employees and to determine the manner of transacting the City's business and affairs (General City Law, § 20, subds. 1, 17, 19; § 23, subd. 1). The Charter also specifically authorizes the Mayor to supervise city offices and departments, fix salaries, adopt wage plans and prescribe rules governing working conditions (New York City Charter [1963], §§ 123, 124, 813 [subd. 1]). His executive power and discretion thus amply extend to and encompass the proposed action here under review, and no further legislative sanction is required.

Contrary to the petitioners' contention, the Mayor's discretion to decide which employee organization should have check-off privileges is not curtailed by section 93-b of the General Municipal Law. That section provides, in its subdivision 1, that a municipality is "authorized" to deduct dues from its employees' pay.[4] It is unmistakably per-

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[4] Section 93-b, subdivision 1, reads, in part, as follows:

"The fiscal or disbursing officer of every municipal corporation * * * is hereby authorized to deduct from the * * * salary of any employee of such corporation * * * such amount that such employee may specify in writing filed with such * * * officer for the payment of dues in a duly organized association or organization of civil service employees and to transmit the sum so deducted to the said * * * organization. Any such written authorization may be withdrawn by such employee or member at any time by filing written notice of such withdrawal with [such] officer."

missive, not obligatory. It does not control a municipality's selection of the unions, if any, to which it may grant the privilege of the check-off; and it certainly does not mandate the continuance of the check-off to minority unions. The only requirements which the section imposes are that, if a municipality does adopt the check-off for any union, (1) it must obtain an employee's written consent before deducting his dues; (2) it must allow the employee to withdraw that consent at any time; and (3) the procedure must be made available only to organizations of civil service employees. These conditions are met in the Mayor's proposed order.

That this State's legislative policy is not antagonistic to the check-off plan embodied in the proposed executive order is manifest, also, from the terms of the Public Employees' Fair Employment Act (Civil Service Law, art. 14; L. 1967, ch. 392, known also as the Taylor Act). As the court noted in the course of its opinion at Special Term, that statute—which did not take effect until some months after he announced his decision—explicitly gives majority unions of public employees the right to have their members' check-off requests honored, and is silent concerning the right to such check-off on behalf of minority unions (Civil Service Law, § 208). Although our decision in this case will have prospective effect, we need not decide whether the Taylor Act is applicable; it is sufficient to observe that, if the Act does apply, it can only reinforce the decision which we reached on the basis of the pre-existing law. In short, the Mayor's proposed policy is plainly consistent with the scheme set forth in the Taylor Act for according recognition, and a degree of union security, to bargaining agents for public employees; to mention but one provision, section 208 makes it mandatory upon a public employer to extend a "right" of membership dues deduction to a union "certified" or "recognized" pursuant to the statute. (See, also, Civil Service Law, §§ 204, 212.) Whatever discretion a public employer may have, under the Act, to grant the check-off

to a minority union not recognized as a bargaining agent—and that question is not before us—the employer is plainly under no obligation to do so.

Since we find no statutory obstacle in the way of the City's proposed check-off policy, we turn to a consideration of whether that policy would, as Local 832 urges, deprive it of due process or equal protection of the laws. We agree with the courts below that it would not. The requirements of due process are satisfied as long as the challenged measure is reasonably related to the attainment of a permissible objective. (See, e.g., *Railway Employes' Dept.* v. *Hanson,* 351 U.S. 225, 233-235; *Virginian Ry.* v. *Federation,* 300 U.S. 515, 558-559.) Similarly, the standards of equal protection are met if a classification, or a distinction among classes, has some reasonable basis. (See, e.g., *Baxstrom* v. *Herold,* 383 U.S. 107, 111; *Morey* v. *Doud,* 354 U.S. 457, 464-464; *Bucho Holding Co.* v. *State Rent Comm.,* 11 N Y 2d 469, 477.)

In the case before us, the existence of such a reasonable relationship and basis is apparent. The maintenance of stability in the relations between the City and employee organizations as well as the avoidance of devasting work stoppages, are major responsibilities of the city administration. The Mayor seeks to further these objectives by introducing into city labor relations a practice which has become commonplace in private industry and in the labor policies of other governmental bodies. For example, the Federal Railway Labor Act specifically empowers the carrier and the exclusive bargaining agent to agree on an exclusive dues check-off (45 U.S. Code, § 152 Eleventh [b]); the practice is authorized for organizations of Federal civil service employees (Code of Fed. Reg., tit. 5, § 550.304 [a][5]; Executive Order 10988, §§ 5, 6, Jan. 17, 1962, 27 Federal Register, p. 551); and it is also followed—according to the record before us—by the New York City Housing Authority and the New York City Transit Authority. The City program is in accord with national labor

policy, which has been built on the premise that a majority organization is the most effective vehicle for improving wages, hours and working conditions. (See *NLRB* v. *Allis-Chalmers,* 388 U.S. 175, 180.) Be that as it may, we may not consider the merits or the ultimate wisdom of the policy (see *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 488); it is enough, as already indicated, that a method of implementing union security, so widely utilized and so long tested as the one proposed by the Mayor, may not be said to lack a reasonable basis or to be unrelated to the City's legitimate purposes.

The petitioners also argue that the withdrawal of the dues check-off will weaken their minority union to the point of threatening its very existence. They will thus be deprived, they assert—pointing to such decisions as *Bates* v. *Little Rock* (361 U.S. 516), *N.A.C.C.P.* v. *Alabama* (357 U.S. 449) and *Thomas* v. *Collins* (323 U.S. 516)[5]—of their right of freedom of association guaranteed by the First and Fourteenth Amendments of the Federal Constitution and by Article I of the State Constitution. Their claim lacks substance. Nothing in the City's labor policy denies members of the petitioners' union the right to meet, to speak, to publish, to proselytize and to collect dues by the means employed by thousands of organizations of all kinds, that do not have the benefit of a dues check-off. Neither the First Amendment nor any other constitutional provision entitles them to the special aid of the City's collection and disbursing facilities.

The order appealed from should be affirmed, with costs.

* * *

Order affirmed with costs. Opinion by Fuld, Ch. J. All concur.

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[5] The petitioners' reliance on these decisions is misplaced. The cited cases involved attempts by states to hinder organizations by some affirmative prohibition upon, or intrusion into, their activities. There is not the slightest suggestion that a state or other body must provide services to an organization to help it maintain its competitive position with its rivals.

APPENDIX B

(Opinion of the New York Supreme Court, New York County, at Special Term, dated July 25, 1967)

ABRAHAM J. GELLINOFF, JUSTICE

This proceeding and the companion proceeding in Feinstein v. The City of New York are brought pursuant to CPLR, article 78, against the City of New York, its Mayor and other named City officials. The petitioners in the respective proceedings are Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a local labor union, suing by its president, and several of its members who are employed by the City in *non-supervisory clerical titles;* and Local 237, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a local labor union, suing by its president, and several of its members who are employed by the City as *hospital "aides."* Each proceeding is brought on behalf of the petitioner and all other City employees similarly situated.

The controversy concerns the practice of "check-off," whereby the amount of an employee's union dues is deducted from his wages by his employer, pursuant to his written authorization, and transmitted by the employer to the union. Such a practice for the check-off of the union dues of City employees was first authorized by the City through a resolution adopted by the Board of Estimate in 1956. That resolution provided that any union or other organization of City employees could avail itself of the privilege of check-off by filing written authorizations therefor, signed by the particular employees, which were to be at all times subject to revocation by such employees; but it was specifically prescribed that such privilege was to be made "available to all unions, without discrimination." At the time of the adoption of that resolution, the City did not

extend recognition to any union or other employee organization for purposes of collective bargaining, and permitted qualified employees organizations to represent their members only for the limited purpose of conferring with a City department head concerning grievances and working conditions.

In 1956 the City adopted a new Employee Relations Program under which collective bargaining on behalf of all the employees in an appropriate bargaining unit was thereafter to be conducted solely by the employee organization chosen for that purpose by a majority of the employees in such unit. No change was made, however, in the provisions of the 1956 resolution extending the privilege of check-off to all unions alike, without regard to whether they represented a majority or a minority of the employees in the particular bargaining unit.

In April, 1967 the mayor promulgated a new executive order on the subject of bargaining between the city and labor unions, to take effect June 1, 1967. This new order, among other things, differentiates between "City-wide majority representative" and "Departmental majority representative," between "City-wide bargaining unit" and "Departmental bargaining unit. In addition, and as part of his plan to improve the city's employee relations program and collective bargaining process, the mayor is about to issue a further executive order dealing with the "check-off."

Under the contemplated order, every employee organization which is freely chosen as the exclusive bargaining representative by the majority of the employees in a city-wide bargaining unit will be afforded the privilege of dues check-off. This will not be a matter of contract but will be made available upon the designation or certification of such status. Dues checking off privileges of all other organizations in any such city-wide bargaining unit will be discontinued during the period of such city-wide majority representation status.

Appendix B

In the absence of city-wide majority representation for a particular bargaining unit, the freely chosen departmental majority representative of the employees in such category will be similarly granted the dues check-off privilege, but only until a city-wide majority representative is chosen. The privilege will be withheld from every other organization in the departmental bargaining unit during such departmental majority representative status.

In the absence of both city-wide and departmental majority status in a bargaining unit, every qualified employee organization having members in such unit will have the privilege of such dues check-off, but only until a city-wide or departmental majority representative is chosen for the unit.

In no event would dues be deducted from an employee's salary except upon his written authorization for such deduction; and such authorization may be revoked at any time.

The mayor has entered into collective bargaining agreements providing for such exclusive check-off arrangements with District Council 37, the city-wide majority representative of city employees holding positions in the *non-supervisory clerical* titles, and with Local 420, the city-wide majority representative of certain classes of *hospital "aides"* employed by the city; and has committed himself to promulgate the above-described executive order in order to implement the exclusive check-off provisions in such agreements. District Council 37 and Local 420 are both affiliates of the American Federation of State, County and Municipal Employees, AFL-CIO.

The petitioning local unions, which respectively represent a minority of the employees in such classifications on a city-wide basis, seek to restrain the city officials from effectuating this new exclusive check-off policy. They demand judgment that respondents must continue to check-off dues to petitioners, and judgment that respondents are without authority to grant exclusive dues check-off privileges to

District Council 37 or Local 420 or any other labor organization. The validity of the collective bargaining agreements to the effect that the mayor will promulgate the pending implementing executive order is thus in issue. These collective bargaining agreements constitute a "final determination" subject to review under article 78 of the CPLR (Matter of Lipsett v. Gillette, 12 N. Y. 2d 162, 166 [1962]). The instant proceedings were commenced before the mayor's pending executive order could be issued, and the parties have stipulated that "no steps would be taken to discontinue the existing system of dues check-off pending the determination of the proceedings by Special Term."

Petitioners challenge the contemplated executive order for exclusive check-off as beyond the purview of the mayor's executive authority, as inconsistent with controlling statutory provisions, as contrary to the civil service provisions of the state constitution, and as violative of the federal and state constitutional guarantees of due process and equal protection. There is no merit in petitioners' contentions.

The original check-off resolution, in 1956, was adopted by the board of estimate in the exercise of the residual power vested in it by the 1938 city charter; such residual power encompassed "all the powers vested in the city except as otherwise provided by law" (N. Y. City Charter [1938] 70; see Matter of Moriarity v. Kennedy, 20 Misc. 2d 593, 596-7). Under the present city charter this residual power is vested in the mayor (N. Y. City Charter [1963] sections 8a, 1142). The mayor is thus vested with the broad general powers conferred upon the city by statute: to enter into contracts, to regulate the selections, terms of employment and compensation of city employees and to determine the manner of transacting the city's business and affairs (see Gen. City Law, section 20, subdivisions 1, 17, 19; id., section 23, subdivision 1). The charter also specifically empowers the mayor to supervise city offices and departments, to fix salaries, to administer budget appropriations, to

adopt wage plans and to prescribe rules governing working conditions (see N. Y. City Charter [1963] sections 123, 124, 813, subdivision i). It is therefore clear that the mayor's power to prescribe the conditions of a check-off is squarely within the ambit of the broad powers conferred upon him by the charter.

There is no substance to petitioners' contention that the regulation of check-off is a legislative function beyond the purview of the mayor's executive powers. The board of estimate's original 1956 resolution authorizing check-off of union dues of city employees was a valid exercise of the residual power then vested in it by the 1938 charter and did not require legislative implementation (cf. Matter of Moriarity v. Kennedy, 20 Misc. 2d 593, 596-7). Such residual power, being now vested in the mayor, likewise does not require legislative implementation.

Of course, the exercise by the mayor of any power which he does possess is necessarily conditioned on its not being inconsistent with any applicable state enactment (Wholesale Laundry Bd. v. City of New York, 17 A. D. 2d 327, 12 N. Y. 2d 998). Petitioners therefore, also urge that the intended exclusive check-off executive order is squarely in conflict with General Municipal Law section 93-b, subdivision 1. That section, which was first enacted in 1958, two years after the adoption by the board of estimate of the original check-off resolution, provides, in pertinent part, that "[t]he fiscal or disbursing officer of every municipal corporation * * * is hereby *authorized* to deduct from the wage or salary of any *employee* of such municipal corporation * * * such amount that such employee may specify in writing filed with such fiscal or disbursing officer for the payment of dues in a duly organized association or organization of civil service employees and to transmit the sum so deducted to the said association or organization." It further provides that "[*a*]*ny* such written authorization may be withdrawn by such employee or member at any time by filing written no-

tice of such withdrawal with the fiscal or disbursing officer" (Italics by court). Petitioners' contention, in essence, seems to be that the Legislature, by virtue of section 93-b (supra), preempted the subject matter of check-off of municipal employees' union dues, that such check-offs may now be made only, as authorized by section 93-b, and that the clear implication of the statute is that any municipality adopting the practice of check-off must make it available on a nondiscriminatory basis to "any employee" who files a written authorization therefor as therein provided.

It is clear, however, as noted, that the city's power to adopt and regulate the practice of check-off does not rest on section 93-b, being encompassed, instead, in the grant to municipalities of general powers for the regulation of their internal affairs, previously made by the Legislature (Gen. City Law, section 20). Moreover, there is no indication in section 93-b of any purpose to occupy or preempt the entire field of check-off (Cf. McMillen v. Browne, 14 N. Y. 2d 326, 333). The section is thus of a purely permissive nature and does not confer any right on any employee to require compliance with his request for the check-off of his union dues (Matter of McLaughlin v. Niagara Falls Bd. of Ed., 38 Misc. 2d 143). Its effect is merely to require that, if a municipality does decide to exercise its power to make payroll deductions on account of the union dues of any of its employees, it must adhere to the limitations specified in the section (Cf. Matter of Devita v. Scher, 52 Misc. 2d 138). The only limitations mentioned in the section are that there must be on file with the fiscal or disbursing officer a written authorization by the employee for such a deduction, that the deduction be "for the payment of dues in a duly organized association or organization of civil service employees," and that such authorization be subject to withdrawal by the employee at any time. There is no requirement in the section that every employee be granted the right to have such a deduction made at his request.

Appendix B

It has been declared, that where, as the court finds is the case here, the state has not occupied or preempted an entire field, a municipality which is empowered to act in that field may, in spite of general regulations by the state, adopt additional regulations or requirements, not inconsistent with the state enactment, where warranted by special local conditions (see Matter of Kress & Co. v. Dept. of Health, 283 N. Y. 55, 59). There would thus be nothing to prevent a municipality from attaching additional conditions to the availability of check-off beyond those specified in section 93-b, as, for example, that the particular employee organization be one that meets certain reasonable standards. Here the city has imposed the further condition that the dues to be deducted be for membership in the employee organization that has been duly selected as the majority representative for all the employees in the applicable bargaining unit. The imposition of that condition contravenes neither the letter nor the intent of section 93-b.

It may be noted, in passing, that the recently enacted Public Employees' Fair Employment Act, effective September 1, 1967, and not here applicable, gives majority unions of public employees the right to have their members' check-off requests honored; but the statute is silent concerning the right to check-off on behalf of minority unions (Civil Service Law, section 208, as added by L. 1967, ch. 392).

Petitioners' further contention that the challenged exclusive check-off procedure is in conflict with the constitutional and statutory provisions governing appointments, tenure and promotions in civil service (N. Y. Const., Art. 5, section 6; Civil Service Law, sections 61, 95, 115), is not persuasive. In point of fact, the practice of check-off, whether on an exclusive or a non-exclusive basis, can in no way operate to affect or prejudice the employee's civil service rights. No deduction may be made from the employee's salary or wages under the city's intended check-off program unless the employee himself consents thereto, and

he remains free to revoke such consent at any time, without in any way affecting his tenure.

Finally it remains to be considered whether the intended executive order runs afoul of the constitutional guarantees of due process and equal protection (U. S. Const., Amend. XIV; N. Y. Const., Art. 1, secs. 6, 11). The requirements of due process are satisfied so long as the challenged measure is reasonably related to the attainment of a permissible objective (Railway Employes' Dept. v. Hanson, 351 U. S. 225, 233-5; Virginia Ry. Co. v. System Federation, 300 U. S. 515, 558-9; Labor Relations Board v. Jones & Laughlin, 301 U. S. 1, 43-5). Similarly, the equal protection clause requires no more than that a classification made have "some reasonable basis" (Morey v. Doud, 354 U.S. 457, 463-4; Bucho Holding Co. v. State Rent Comm., 11 N. Y. 2d 469, 477), and that "a distinction made have some relevance to the purpose for which the classification is made" (Baxstrom v. Herold, 383 U.S. 107, 111). The courts may not strike down governmental measures merely "because they may be unwise, improvident or out of harmony with a particular school of thought" (Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488).

We are here dealing with the highly sensitive area of employer-employee relations affecting the city's huge working force of over 250,000 employees. Present experience attests to the untold havoc that can follow in the wake of the disruption of vital city services consequent upon employee work stoppages and to the crucial importance of adopting suitable programs for the maintenance of stable and equitable relations between the city and its employees. To that end, the city's employee relations program has since 1958 embodied the policy of according exclusive recognition for purposes of collective bargaining to the duly selected majority employee representatives in designated appropriate bargaining units. That practice is of undoubted

validity (cf. Matter of Kleinman v. McCoy, 19 N. Y. 2d 202; Civil Service Forum v. New York City Transit Authority, 4 A. D. 2d 117, 128, affd. 4 N. Y. 2d 866).

The city has now determined that the attainment of the high objectives of its employee relations program demands that the employee organization duly chosen by a majority of the employees in a designated bargaining unit to serve as the exclusive representative of all of the employees in such unit for purposes of bargaining and grievance procedure, should also be accorded the exclusive privilege of check-off, so long as it maintains its majority representative status. The stated purpose is to strengthen the role of the selected organization as majority representative. Any employee remains free to refuse to sign a check-off authorization, or to revoke a previously executed authorization, and he may continue his membership in a minority employee organization or choose not to belong to any union.

As the Appellate Division has aptly declared in an analogous situation (Matter of Patrolmen's Benevolent Assn. v. Wagner, 8 A. D. 2d 369, 373, affd. 7 N. Y. 2d 813, cert. den. 363 U. S. 810):

> "It is not for the courts to establish or evaluate administrative policies pertaining to the relation between the City of New York and its employee. We may only adjudicate the power of the respondents [City officials] and the extent thereof in the promulgation of such policies. The courts may intrude only to a very limited extent upon the policy-making powers of the respondent Mayor of the City of New York which involve complex, difficult and controversial matters in a very sensitive area or employer-employee relations between the city and its thousands of employees."

Appendix B

There appears to be ample precedent for the new exclusive check-off policy here under attack. A similar policy has been adopted by Congress in the Railway Labor Act (45 U. S. C. A., sec. 152, Eleventh [b], [c]). It is there specifically provided that dues deduction agreement affecting raiway employees subject to that act may be entered into only between the carrier and the labor organization which represents a majority of the employees in the particular craft or class, and for the exclusive benefit of that labor organization. Those provisions have been consistently enforced by the federal courts, without any suggestion of doubt as to their validity (e.g., Switchmen's Union of North America v. Southern Pacific Co., 253 F. 2d 81, 84 [9th Cir.], cert. den. 358 U. S. 818; Brotherhood of Loc. Fire & Eng. v. Northern Pac. Ry. Co., 274 F. 2d 641 [8th Cir.].

A similar policy prevails in the federal civil service, under which a governmental department is permitted to enter into a dues check-off agreement, effecting the employees in a particular bargaining unit, only with the employee organization representing a majority of the employees in that unit, where such a majority representative has been duly selected (see Code of Fed. Reg., Title 5, sec. 550.304 [a] [5]; Executive Order 10988, sec. 5, January 17, 1962, 27 Fed. Register, p. 551). The practice of according the privilege of exclusive check-off to majority employee representatives is also followed by the New York City Housing Authority and the New York City Transit Authority. Indeed, it appears that one of the petitioner unions, Local 237, itself has an exclusive check-off arrangement with the New York City Housing Authority embracing authority employees in various bargaining units for which that union is the majority representative.

It is unnecessary to determine whether, and to what extent, if any, similar practices prevail in the area of labor

management relations in private industry—a matter on which the parties are in dispute. There is no doubt, however, that the check-off is a widely practiced "means of implementing union security" (see Industrial Union of Union of Shipbuilding Wkrs. v. N. L. R. B., 320 F. 2d 615, 619 [3d Cir.]) and is a proper subject for collective bargaining under the National Labor Relations Act and for inclusion in a union-management contract (see National Labor Relations Board v. Reed & Prince Mfg. Co., 205 F. 2d 131, 136 [1st Cir.]; H. K. Porter Co., Inc., 153 N. L. R. B. No. 119, 59 L. R. R. M. 1462). One early decision has interpreted the National Labor Relations Act as precluding a majority union from obtaining the special advantage of exclusive check-off arrangements as against a rival, minority union (see Hughes Tool Co. v. N. L. R. B., 147 F. 2d 69, 74 [5th Cir.]). We need not, however, consider whether that case accurately reflects the current state of the federal law, since we are not here concerned with the Federal Act or its proper interpretation. The question before this court is not one of interpretation of the challenged measures, but of their constitutionality; and no such issue was either considered or decided in Hughes Tool Company v. National Labor Relations Board, supra.

Actually, majority unions have available to them, under the National Labor Relations Act, union security devices far more extreme than those involving exclusive check-off. Thus, a majority union may enter into an agreement with an employer providing for a union shop, under which all the employees in the particular bargaining unit, including those who belong to a rival union, must within a specified period of time "join and maintain membership in the union designated as the bargaining representative or suffer discharge" (See Pennsylvania Railroad Co. v. Rychlik, 352 U. S. 430, 493). The United States Supreme Court has squarely upheld the validity of the Congressional legis-

lation sanctioning such agreements for a union shop (Railway Employes' Dept. v. Hanson, supra, 351 U. S. 225, 233-5; see Radio Officers' Union v. N. L. R. B., 347 U. S. 17, 40-41; Cf. Colgage-Palmolive Peet Co. v. N. L. R. B., 338 U. S. 355, sustaining the earlier Federal legislation which permitted agreement for a closed shop).

There is all the more reason for applying the rationale of those decisions to more moderate union security measures such as those at bar, under which the special advantage given to the majority union consists not as under the union shop, of the right to demand and receive dues from employees who would prefer to be non-union or to belong to a different union, but merely of facilitating the collection of dues from those who have freely joined the union of their choice. Whether such measures are wise or provident or best calculated to achieve the objective of stable and equitable employer-employee relations, is not the concern of the courts (See Williamson v. Lee Optical of Okla., Inc., supra, 348 U. S. 483, 488; Matter of Patrolmen's Benev. Ass'n v. Wagner, supra, 8 A. D. 2d 369, 373). "The task of the judiciary ends once it appears that the * * * measure adopted is relevant or appropriate" to the attainment of a permissible goal (Cf. Railway Employees' Dept. v. Hanson, supra, 351 U. S. 225, 234). This court cannot say that the measures here in question do not meet that test or that they do not satisfy the requirements of due process and equal protection (Cf. Civil Service Forum v. New York City Transit Authority, supra, 4 A. D. 2d 117, 128).

No question as to the validity of exclusive check-off appears to have been decided in Lipsett v. Gillette (12 N.Y. 2d 162), on which both petitioners and the City rely. Petitioners also cite Mugford v. City of Baltimore (185 Md. 266) where it was held that the City of Baltimore lacked the power either to grant the privilege of exclusive check-

off to a majority union of municipal employees or even to recognize that union as the exclusive representative of the employees in the particular bargaining unit for purposes of collective bargaining. The rationale of that decision is plainly at odds with the approach taken by the courts of this State (Cf., e.g., Matter of Kleinman v. McCoy, supra, 19 N.Y. 2d 202; Civil Service Forum v. New York City Transit Authority, supra, 4 A D 2d 117, 128).

The court arrives at the conclusion that the exclusive check-off provisions of the two collective bargaining agreements involved herein are valid and that the exclusive check-off provisions in the intended Executive Order in implementation of the exclusive check-off provisions of the agreements are valid. Accordingly, the relief prayed for in each of the petitions is, in all respects, denied and the proceedings are dismissed.

Settle order.

A. D. G.,
J.S.C.

Dated, July 25, 1967

Filed
Aug 15 1967
New York County Clerk's Office

APPENDIX C

(Judgment of the Court of Appeals of the State of New York, dated April 11, 1968)

No. 19

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of April in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

WITNESS,

THE HON. STANLEY H. FULD,
Chief Judge, *Presiding*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR—April 11, 1968

1. No. 19 68

In the Matter of

HERBERT S. BAUCH as President of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, & ors., &c.,

Appellants,

vs.

THE CITY OF NEW YORK, & ors., &c.,

Respondents.

BE IT REMEMBERED, That on the 27th day of January in the year of our Lord one thousand nine hundred and

sixty-eight, Herbert S. Bauch, as President of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Cohen & Weiss, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The City of New York, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by J. Lee Rankin, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Samuel J. Cohen, of counsel for the appellants, and by Pauline K. Berger, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, accord-

ing to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, April 11, 1968.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

(SEAL)

(39129) SUPREME COURT, U. S.
Office-Supreme Court, U.S.
FILED
JUL 12 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 204

HERBERT S. BAUCH, as President of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and ELIZABETH BOND, CLARA LEVINE, SHIRLEY FEINBERG and ELIZABETH McGEE on behalf of themselves and all other employees of the City of New York who have executed authorizations for payroll deductions in favor of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, similarly situated,

Petitioners,

against

THE CITY OF NEW YORK, JOHN V. LINDSAY, Mayor of the City of New York, MARIO PROCACCINO, Comptroller of the City of New York, HENRY SHEMIN, Commissioner of Labor of the City of New York, and HERBERT HABER, Director of Labor Relations of the City of New York,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1968

No. 204

HERBERT S. BAUCH, as President of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and ELIZABETH BOND, CLARA LEVINE, SHIRLEY FEINBERG and ELIZABETH McGEE on behalf of themselves and all other employees of the City of New York who have executed authorizations for payroll deductions in favor of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, similarly situated,

Petitioners,

against

THE CITY OF NEW YORK; JOHN V. LINDSAY, Mayor of the City of New York, MARIO PROCACCINO, Comptroller of the City of New York, HENRY SHEMIN, Commissioner of Labor of the City of New York, and HERBERT HABER, Director of Labor Relations of the City of New York,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, City of New York and others, for their statement in opposition to petitioners' application for a writ of certiorari, respectfully show the following:

Question Presented

The Mayor of the City of New York agreed in collective bargaining with a majority union that he would institute a majority union dues check-off procedure for those employee organizations which have majority status in the various bargaining units; provided, however, that dues may be deducted from an employee's salary only upon his written authorization for such deduction. R38-40.[1]

Under the agreed plan, when one employee organization achieves majority status and is recognized as the exclusive bargaining agent for a unit, only that organization gets the dues check-off, during the period of its majority status, and each minority organization in that unit reverts to individual collection of dues. The purpose of the plan is to strengthen the ability of the majority unions to bargain collectively, thereby increasing the effectiveness of the collective bargaining process towards securing efficient and uninterrupted functioning of City government. R. 38, 43.

The agreed plan was upheld by Mr. Justice Gellinoff at a Special Term of the New York State Supreme Court and his decision was unanimously affirmed in each Appellate Court of the State. R. 117-129, 133; P. 1a-6a, 7a-19a. The State Courts held that: (1) The Mayor has full power under State law to enter into the collective bargaining agreement and to place the agreed plan into operation (P.

1. The letter "R", followed by numerals, refers to the page numbers of the "Papers on Appeal" submitted by the petitioners to this Court as the printed record in this case.

The letter "P" followed by numerals refers to the page numbers of the instant Petition for a Writ of Certiorari.

1a-5a); (2) The plan does not violate any State constitutional provision or law uniquely applicable to civil service employees or unions of civil service employees (P. 13a-14a); and (3) The plan is consistent with the State and Federal constitutional requirements of due process of law, equal protection of the laws, and freedom of association and speech (P. 5a-6a).

In the instant petition, the petitioners contend that the plan invades the constitutional rights of a minority union and its members to due process of law, equal protection of the laws, and freedom of association and speech, under the First and Fourteenth Amendments of the Constitution of the United States.

Statement of the Case

A. Description of the Agreed-Upon Majority Union Dues Check-off Plan

The agreed-upon majority union dues check-off plan is embodied in a proposed executive order of the Mayor.[2] R. 55-60. It provides that the union which is chosen by the majority of the workers in a city-wide bargaining unit

2. Before the Mayor's Executive Order effectuating the plan could be issued, the instant proceeding was commenced in the State Supreme Court. The parties stipulated that no steps would be taken to discontinue the existing system of dues check-off pending determination of the proceedings by the State Courts. After the final determination of the New York State Court of Appeals the City Comptroller began the preliminary steps necessary to enable the Mayor to place the plan in operation. However, upon the application of the petitioner, the Chief Judge of the New York State Court of Appeals granted a stay until July 29, 1968. However, the Order of Chief Judge Fuld preserved the right of the City to continue taking the necessary preliminary steps to implement the program.

to be the sole bargaining agent for the unit, is granted the dues check-off. This will not be a matter of contract but will be made available upon the designation or certification of such status. Dues check-off to all other organizations in any such city-wide bargaining unit will be discontinued during the period of such city-wide majority representation status.

If a bargaining agent has not been chosen for a particular city-wide bargaining unit, but a departmental bargaining agent has been selected for employees in that category, the departmental bargaining agent will have the check-off, but only until a city-wide bargaining agent is chosen. Dues check-off to every other organization in the departmental bargaining unit will be discontinued during such departmental majority status.

If no city-wide and no departmental bargaining agent have been chosen for the employees in a bargaining unit, every union having members employed in the unit will have dues check-off but only until a city-wide or departmental representative is chosen for those employees.

Thus, District Council 37 (the majority union in the city-wide unit of non-supervisory clerical positions) will not be the only organization to which dues check-off will be made under the plan. Since petitioner Local 832 alleges that it is the city-wide bargaining agent in other city-wide bargaining units (R. 10), it will have the check-off in those units, just as any other city-wide bargaining agent in any other city-wide unit.

The plan grants the privilege alike to all city-wide majority representatives in the various bargaining units. It

is based on equal treatment of all bargaining representatives. All minority unions are treated equally with each other.

Moreover, check-off remains an element of choice for each individual employee. No check-off of dues may be made without the employee's authorization. He can authorize or revoke check-off at any time. R. 59-60. He is still free to pay dues personally to any union of his choice, and to join or refrain from joining any organization. The plan does not restrain or prohibit Local 832 or any other minority organization from pursuing organizational activities and successfully gaining a sufficient number of employee adherents so as to become and replace the city-wide majority representative in the bargaining unit. R. 43, 78.

Thus, the plan merely utilizes the dues check-off facility in furtherance of the public purposes of: (a) supporting and strengthening the ability of a city-wide representative, once it has been chosen by the majority, to carry out the responsibilities and burdens for which it was chosen and to effectuate collective bargaining in the city-wide bargaining unit; and (b) if no city-wide representative has been chosen, but a departmental representative has been chosen, similarly strengthening and supporting such departmental representative until a city-wide representative is chosen; and (c) encouraging the growth and development of responsible employee organizations from which a majority representative may eventually be chosen in any bargaining unit where majority representation has not yet been achieved by the employees. R. 42.

B. Labor Relation Principles Underlying the Plan (R. 70-81)

The plan was adopted to meet a need for more effective collective bargaining. R. 70-71.

It is axiomatic that the key to prevention of employer-employee controversies is in the reaching of prompt and responsible agreements through genuine, effective collective bargaining with the true representative of the employees. Cf. *Machinists* v. *Street,* 367 U. S. 740, 750 (1960). Therefore, the collective bargaining process must be so structured as to facilitate the reaching of such agreements, without deadlocks, and preferably, without the necessity for invoking impasse, mediation or arbitration procedures. R70.

In prescribing collective bargaining exclusively with the majority organization, as the method of securing stable employee relations, the City Program confers upon the majority organization a clearly defined and delineated role in effectuating the City purpose of preserving continuity of governmental functioning. R71; R51; cf. *Machinists* v. *Street,* 367 U. S. 740, 760-761 (1960).

Thus the success of the City Employee Relations Program depends to a great extent upon the maturity, responsibility and effectiveness with which the majority representative is able to perform its representative collective bargaining role. The objective of the Program cannot be achieved by procedures which stimulate or give aid and encouragement to wasteful rival organizational campaigns disrupting stability in the bargaining relations between the City and the freely chosen majority representative. R71-72; cf. *Pennsylvania R. R. Co. Rychlik,* 352 U. S. 480,

493-494 (1956); see also testimony of William M. Leiserson in *Virginian Ry.* v. *Federation,* 300 U. S. 515, footnote on p. 546.

Experience in the private and public sectors has demonstrated that where the majority organization is given a defined role in an employee relations program, to secure the uninterrupted and efficient functioning of the employer's enterprises, it is necessary to provide arrangements which aid and strengthen that organization's ability to carry out that role. Decision of NLRB in *H. K. Porter Co. Inc.,* 59 LRRM 1462, July 9, 1965; also, cf. *Machinists* v. *Street, supra,* 367 U. S. 740, 759-762 (1960).; *Pennsylvania R. R. Co.* v. *Rychlik,* 352 U. S 480, 488-489, 494 (1956). Such arrangements in the private sector are commonly referred to as "union security" provisions. R72.

Exclusive check-off is the least onerous or severe form of union security. It has no compulsory aspects. Yet it enables the majority-chosen organization, during the continuance of its collective bargaining agency, to withstand, with less harm to its representative functioning, the effects of wasteful rivalries and disruptive minority campaigns. R72, 73-75. As such, it tends to create a climate which promotes freedom to contract and facilitates reaching of agreement.

C. Prevalence of Exclusive Majority Union Dues Check-off in Other Sectors

The Mayor's belief that the majority union dues check-off procedure will strengthen the collective bargaining process is also supported by the prevalence of the practice in private industry and other governmental bodies.

For example, as to the railroad and airline industries, the Federal Railway Labor Act contains a specific authorization for the carrier and the exclusive bargaining agent to agree on exclusive dues check-off for the exclusive bargaining agent. 45 U. S. Code §152 Eleventh (c). The Senate Report approving the law stated:

> "This right is possessed by unions representing employees in industry generally." R77.

Furthermore, the above described provision of the Railway Labor Act, like the instant plan, prohibits check-off of union dues to any union other than the majority chosen exclusive bargaining agent. *Switchmen's Union of N.A.* v. *Southern Pacific Co.*, 253 F. 2d 81 (9th Cir., 1958), cert. den. 358 U. S. 818 (1958), reh. den. 358 U. S. 896 (1958).

The Federal Government, too, has borrowed a page of experience from the private and railway sectors and has included in its employee relations program authority to agree to dues check-off solely for the organization accorded exclusive recognition or where "exclusive" recognition has not been achieved, for the organization accorded "formal" recognition. Code of Federal Regulations, Title 5, §550.304(a)(5). Where such recognition occurs, all other organizations in the unit revert to individual collection of dues. R82.

On the local government level, the New York City Transit Authority has had the exclusive check-off procedure since 1954; and the New York City Housing Authority has expressly provided for discontinuance of dues check-off to all other employee organizations in a bargaining unit

when an exclusive representative receives dues check-off under a collective bargaining agreement. R77, 83-86, 87.

As the New York State Court of Appeals said (per FULD, C.J.):

> "* * * a method of implementing union security, so widely utilized and so long tested as the one proposed by the Mayor, may not be said to lack a reasonable basis or to be unrelated to the City's legitimate purposes." P. 6a.

ARGUMENT

Applicable decisions of this Court, when applied to the questions presented by the petitioner make it abundantly clear that these questions are not of sufficient substance to warrant review by this Court.

A. Due process

This Court has uniformly held that a measure adopted to secure stability in management-employee relations conforms with the constitutional due process requirements, if the measure is relevant or appropriate to that purpose. Once it appears that there is a rational basis for concluding that the measure will aid in securing this clearly permissible objective, the "task of the judiciary ends." The question is then merely "one of policy with which the judiciary has no concern". *Railway Employees Dep't* v. *Hanson,* 351 U. S. 225, 233-235 (1955); *Virginian Ry. Federation,* 300 U. S. 515, 558-559 (1936); *National Labor Relations Board* v. *Jones & Laughlin,* 301 U. S. 41-46 (1936); *Texas & N.O.R. Co.* v. *Ry. Clerks,* 281 U. S. 548 (1930). See also, *Hudson* v. *Atlantic Coast Line R.R. Co.,* 89 S.E. 2d 441, 447

(Sup. Ct. N.C. 1955), cert. den. 351 U. S. 949 (1956); *Smith* v. *Gov't of Virgin Islands,* 320 F. 2d 136 (3rd Cir., 1964), cert. den. 377 U. S. 979 (1946); *Seagram & Sons* v. *Hostetter,* 384 U. S. 35, 46-48 (1965).

Thus, the Court has upheld as "relevant" to the permissible Congressional objectives of securing industrial peace in interstate commerce, the following measures based on the majority rule concept in labor relations:

An act authorizing the employer and the majority union to make a union shop agreement (*i.e.,* requiring all employees to become members of the majority union as a condition of continued employement) notwithstanding a State constitutional "right to work" provision to the contrary (*Hanson, supra,* 351 U. S. at pp. 233-235);

An act establishing an exclusive majority representation procedure to prevent strikes and subjecting to restraint both the right of employees to engage in group action, through a company union, interfering with the freedom of choosing the exclusive bargaining representative, and the right of the carrier to encourage and favor such group action (*Texas & N.O.R. Co.* v. *Ry. Clerks, supra,* 281 U.S. at p. 548); and

An act requiring an employer to negotiate only with the union chosen by the majority of the employees and prohibiting negotiation with any other union. *Virginian Ry. Co., supra,* 300 U. S. at pp. 558, 559; *National Labor Relations Board* v. *Jones & Laughlin, supra,* 301 U.S. at pp. 43 *et seq.*

The Record in the instant case demonstrates that the majority union check-off plan is based on well-established principles of sound labor relations and that its practice is prevalent in the private labor sector and in other governmental bodies. *Supra,* pp. 6-9; R. 67-78, 113. In the instant case, therefore, as in the above cited decisions, it is abundantly clear that the majority union dues check-off measure is relevant and appropriate to the permissible municipal goal of securing stability in governmental functioning.

Accordingly, under the above cited decisions of this Court, the adoption of the majority union dues check-off plan does not violate the constitutional requirement of due process.

B. Equal protection clause

This Court has consistently held that the equal protection clause of the Federal Constitution permits distinctions between classes of persons who are subject to State or Federal measures, if the distinctions that are drawn have "some relevance to the purpose for which the classification is made." *Rinaldi* v. *Yeager,* 384 U. S. 305, 309 (1966); *Seagram & Sons* v. *Hostetter,* 384 U. S. 35, 50 (1965); *Walters* v. *City of St. Louis, et al.,* 347 U. S. 231, 235-237 (1954); *Tigner* v. *Texas,* 310 U. S. 141, 147 (1939); *Hudson* v. *Atlantic Coast Line R.R. Co.,* 89 SE 2d 441, 452, 242 N. C. 650 (Sup. Ct., N. C., 1955), cert. den. 351 U. S. 949 (1955); *Welch* v. *New Hampshire,* 306 U. S. 79, 82-83 (1939); see also: *Matter of Patrolmen's Benevolent Assn.* v. *Wagner,* 8 A D 2d 369, 372 (1st Dept., 1959), aff'd 7 N Y 2d 813 (1959), cert. den. 363 U. S. 810 (1960).

For the purpose of strengthening the collective bargaining process, the majority union dues check-off plan draws a distinction between: (a) the organization which is chosen by the majority in a bargaining unit to be the exclusive representative for the unit, and which, by reason of that status, has defined collective bargaining responsibilities, and (b) all other organizations in the unit not so chosen and not having any such responsibilities.

Here again, the relevance of such a distinction to the goal of securing stability in governmental functioning, is attested to by the fact that the same distinction is drawn for the same purpose in the railroad, private and public labor sectors, *supra,* pp. 7-9.

Accordingly, the State Court's decision that the plan involves no denial of equal protection of the laws is in full accord with the principles established by this Court.

C. Freedom of group association

There is no merit whatsoever to the petitioner's contention that the majority union dues check-off plan violates the petitioners' constitutional right of freedom of association.

This Court has rejected an analogous contention with respect to the union shop provisions of the Railway Labor Act. *Railway Employees Dept.* v. *Hanson,* 351 U. S. 225, 236-238. Thus, in *Hanson,* the Court held that *compulsory* membership in and payment of dues to the majority organization, not accompanied by conditions of membership "forcing ideological conformity or other action in viola-

tion of the First Amendment", does not infringe the constitutional right of freedom of group association. 351 U. S. at p. 238. It follows therefore, that the majority union dues check-off plan which involves no compulsion whatsoever to pay dues to, or to join or refrain from joining any organization, does not violate any such right.

As the opinion of the New York State Court of Appeals pointed out, each of the decisions relied upon by the petitioners, such as *Bates* v. *Little Rock*, 361 U. S. 516 (1957); *NAACP* v. *Alabama*, 357 U. S. 449 (1960), and *Thomas* v. *Collins*, 323 U. S. 516 (1944), involved an affirmative prohibition upon or intrusion into the activities of an organization. P. 6a.

In the instant case, no such prohibition or intrusion exists. In the words of the New York State Court of Appeals (FULD, C.J.):

> "Nothing in the city's labor policy denies members of the petitioners' union the right to meet, to speak, to publish, to proselytize and to collect dues by the means employed by thousands of organizations of all kinds, that do not have the benefit of a dues check-off. Neither the First Amendment nor any other constitutional provision entitles them to the special aid of the city's collection and disbursing facilities." P. 6a.

CONCLUSION

The petition for a writ of certiorari should be denied.

July 11, 1968

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

JUL 22 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 204

HERBERT S. BAUCH, as President of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and ELIZABETH BOND, CLARA LEVINE, SHIRLEY FEINBERG and ELIZABETH McGEE on behalf of themselves and all other employees of the City of New York who have executed authorizations for payroll deductions in favor of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, similarly situated,

Petitioners,

against

THE CITY OF NEW YORK, JOHN V. LINDSAY, Mayor of the City of New York, MARIO PROCACCINO, Comptroller of the City of New York, HENRY SHEMIN, Commissioner of Labor of the City of New York, and HERBERT HABER, Director of Labor Relations of the City of New York,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The brief of the Respondents, filed in opposition to the petition for a writ of certiorari herein, plainly discloses a purpose to suppress minority freedom of expression and association.

Scarcely concealed under euphemistic verbiage is the plan to exterminate minorities as part of a bargained *quid pro quo* granted by the City to appease the appetites of certain majority groups.

The City states that the plan was adopted "to meet a need for more effective collective bargaining" (p. 6). Such an objective is as unassailable as being against sin. How is it to be achieved, however?

The City's brief goes on to state that ". . . the City Program confers upon the majority organization a clearly defined and delineated role in effectuating the City purpose of preserving continuity of governmental functioning" (p. 6). Here is another harmless generality, borrowed and used out of context, but totally devoid of factual content. The next statement is more revealing:

> "The objective of the Program cannot be achieved by procedures which *stimulate or give aid and encouragement to wasteful rival organizational campaigns* disrupting stability in the bargaining relations between the City and the freely chosen majority representative." (p. 6; emphasis added.)

This statement, too, is evidently borrowed, and used out of context. In its present context it can only mean that allowing an employee to pay dues to a minority union of his choice by use of the City's bookkeeping machinery is "aid and encouragement to wasteful rival organizational campaigns." Thus it becomes brutally clear that the City has concluded that it must keep the little unions down in order to appease the big unions.

Any remaining doubt as to the City's purpose is dispelled by the further statement purporting to set forth the City's rationale for exclusivity of check-off:

> ". . . it enables the majority-chosen organization, during the continuance of its collective bargaining agency, *to withstand, with less harm to its representative functioning, the effects of wasteful rivalries and disruptive minority campaigns.* . . . As such, it tends to create a climate which promotes freedom to contract and facilitates reaching of agreement." (p. 7; emphasis added.)

How does a majority union "withstand, with less harm," etc., under this logic, except by suppression of the minority? What is the alleged "climate which promotes freedom to contract" other than a climate of sterility in which opposition has been smothered?

Reference to constitutionally untested uses of allegedly similar discriminatory arrangements are not helpful. As the petition herein shows, this case is the first instance in which constitutionality has been before the Court. It is also of little help to make references to the private sector where compulsion by state action is lacking. Even in the private sector no judicial support for the constitutionality of exclusive check-off can be found.

The City concludes that its measure should be upheld as a reasoned enactment founded upon "a rational basis." The foregoing analysis of its alleged reasoning shows that there is no "rational basis" founded upon fact, but that this is an "unreasoned distinction," supported by mere verbiage, such as this Court has struck down on many occasions, a distinction which flagrantly destroys minority rights without even a colorable claim of legitimate necessity for the majority.

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